[Cite as Columbia Gas Transm. Corp. v. Levin, 117 Ohio St.3d 122, 2008-Ohio-511.]

COLUMBIA GAS TRANSMISSION CORPORATION, APPELLEE AND CROSSAPPELLANT, v. LEVIN, TAX COMMR., APPELLANT AND CROSS-APPELLEE.

[Cite as Columbia Gas Transm. Corp. v. Levin, 117 Ohio St.3d 122, 2008-Ohio-511.]

Personal-property tax — Company primarily engaged in interstate transportation of natural gas is a pipeline company, not a natural gas company, for purpose of taxing company's personal property.

(No. 2006-1443 – Submitted May 2, 2007 – Decided February 14, 2008.)

APPEAL and CROSS-APPEAL from the Board of Tax Appeals, No. 2003-K-1876.

CUPP, J.

{¶ 1} In this matter, the Tax Commissioner appeals from a decision of the Board of Tax Appeals ("BTA") that reversed the Tax Commissioner's determination that Columbia Gas Transmission Corporation ("Columbia") is an interstate-pipeline company as defined in R.C. 5727.01(D)(5) for the purpose of taxing the personal property of an Ohio public utility. The BTA held instead that Columbia satisfied the definition of a natural gas company in R.C. 5727.01(D)(4) and was thus entitled to have its personal property assessed at the 25 percent

valuation rate for such companies in R.C. 5727.111(C), rather than the 88 percent rate for pipeline companies in R.C. 5727.111(D). After review, we have determined that the BTA's decision was unreasonable and unlawful, and therefore, in accordance with R.C. 5717.04, it is reversed. We further find that Columbia's cross-appeal is without merit, and it is overruled.

{¶ 2} In 2000, the General Assembly amended R.C. 5727.111 to reduce the assessment rate on the value of public-utility personal property of Ohio natural gas companies from 88 percent to 25 percent. The 25 percent rate became SUPREME COURT OF OHIO effective beginning with the 2001 tax year. See Am.Sub.S.B. No. 287, 148 Ohio Laws, Part V, 11536, 11549-11550.

{¶ 3} Columbia operates a natural gas pipeline that runs through a number of states. Columbia also maintains an underground system for storing natural gas. For the 2000 and 2001 tax years,[1] the Tax Commissioner assessed Columbia's personal property at the 88 percent rate for natural-gas-pipeline companies.

{¶ 4} Columbia objected to having its taxable property assessed at the 88 percent rate. Columbia claimed that it is a natural gas company under R.C. 5727.01(D)(4), and it requested that the Tax Commissioner reassess its personal property at the 25 percent rate for natural gas companies in R.C. 5727.111(C).

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[1] Columbia's statutory challenges pertain only to the 2001 tax year, while its constitutional challenges pertain to the 2000 and 2001 tax years.

{¶ 5} The Tax Commissioner found that Columbia was not a natural gas company under R.C. 5727.01(D)(4) because it does not supply or distribute natural gas directly to end-use consumers; rather, Columbia transports natural gas interstate through a network of pipelines. Specifically, the Tax Commissioner stated that Columbia's "transportation and storage services are for local gas distribution companies and industrial and commercial customers that contract for gas with producers or marketers. Therefore, [Columbia] is properly classified as a pipeline company under R.C. 5727.01(D)(5)."

{¶ 6} The Tax Commissioner also found that Columbia does not fit the profile of a typical natural gas company. Such companies usually operate in one state only, while pipeline companies tend to be interstate businesses. The Tax Commissioner further noted that the Public Utilities Commission of Ohio ("PUCO") regulates natural gas companies that operate in Ohio, and PUCO does not consider Columbia a natural gas company. Instead, the Federal Energy Regulatory Commission ("FERC") regulates interstate-pipeline companies, and Columbia is subject to regulation by FERC, not PUCO.

{¶ 7} Columbia appealed the Tax Commissioner's final determination to the BTA. The BTA reversed the Tax Commissioner, finding that Columbia satisfied the definition of a natural gas company in R.C. 5727.01(D)(4). The BTA found that R.C. 5727.01(D)(4) was unambiguous and that Columbia satisfied the statutory definition by directly supplying "natural gas to industrial, power-generating, residential, and farm customers for the

purposes (i.e., lighting, power, or heating) delineated in R.C. 5727.01(D)(4)." The BTA also determined that, while Columbia may satisfy the definition of a pipeline company in R.C. 5727.01(D)(5), neither R.C. 5727.01(D)(4) nor (5) imposes a "primary business" test as an element in determining under which definition an entity should be classified for tax purposes. Accordingly, the BTA held that Columbia was entitled to have its property assessed at 25 percent.

{¶ 8} Columbia also argued that applying the pipeline assessment rate to its property violates the Equal Protection and Due Process Clauses of the United States and Ohio Constitutions and the Commerce and the Supremacy Clauses of the United States Constitution. The BTA recognized that it lacked jurisdiction to decide the merits of Columbia's constitutional challenges. See Cleveland Gear Co. v. Limbach (1988), 35 Ohio St.3d 229, 231, 520 N.E.2d 188.

{¶ 9} The Tax Commissioner appealed from the BTA's decision. Columbia filed a protective cross-appeal, again raising its constitutional arguments.

Standard of Review

{¶ 10} In reviewing a decision of the BTA, we determine whether it is "reasonable and lawful." Columbus City School Dist. Bd. of Edn. v. Zaino (2001), 90 Ohio St.3d 496, 497, 739 N.E.2d 783. We "will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion." Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino (2001), 93 Ohio St.3d 231, 232, 754 N.E.2d 789. However, we will affirm the BTA's determinations of factual issues if the record contains reliable and

probative evidence to support the BTA's findings. Am. Natl. Can Co. v. Tracy (1995), 72 Ohio St.3d 150, 152, 648 N.E.2d 483.

{¶ 11} The burden rests on the taxpayer "to show the manner and extent of the error in the Tax Commissioner's final determination." Stds. Testing Laboratories, Inc. v. Zaino, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, ¶ 30. The Tax Commissioner's findings "are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." Nusseibeh v. Zaino, 98 Ohio St.3d 292, 2003-Ohio-855, 784 N.E.2d 93, ¶ 10.

The Tax Commissioner's Appeal

Is a Primary-Business Test Applicable to R.C. 5727.01?

{¶ 12} The Tax Commissioner contends that for determining the proper assessment rate to apply to public-utility property under R.C. 5727.111, an interstate-pipeline company that primarily transports natural gas through pipelines from production and wholesale sources to natural gas distribution systems is a "pipe-line company" as defined by R.C. 5727.01(D)(5), and not a "natural gas company" as defined by R.C. 5727.01(D)(4).

{¶ 13} For purposes of taxing a public utility, a person includes "a natural gas company when engaged in the business of supplying natural gas for

lighting, power, or heating purposes to consumers within this state." See former R.C. 5727.01(D)(4).[2] According to R.C. 5727.01(D)(5), a person also includes "a pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state."

{¶ 14} The Tax Commissioner maintains that the BTA overlooked the dispositive statute on this issue: R.C. 5727.02. The Tax Commissioner argues that R.C. 5727.02(A) expressly establishes a primary-business test for purposes of defining "natural gas company" under R.C. 5727.01(D)(4). In contrast, Columbia argues that R.C. 5727.02 does not address how to distinguish between types of public utilities (e.g., between pipeline and natural gas companies). Rather, it establishes a test for determining whether an entity is a "public utility" at all.[3]

{¶ 15} The BTA found that "[n]either R.C. 5727.01(D)(4) nor (5) imposes a 'primary business' test as an element in determining under which

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[2] R.C. 5727.01(D)(4) was amended during the 2001 tax year to add the words "or distributing" after the word "supplying." The amendment also excluded from the definition of natural gas company "a person that is a governmental aggregator or retail natural gas supplier as defined in" R.C. 4929.01. All references to R.C. 5727.01(D)(4) are to the former version, which was controlling during the time period involved in this matter. Sub.H.B. No. 9, 149 Ohio Laws, Part II, 3857, 3895-3896.

[3] Columbia incorrectly claims that this issue was not preserved for appeal; the Tax Commissioner raised this issue in his amended notice of appeal. See R.C. 5717.04.

definition an entity should be classified for tax purposes." The BTA mentioned R.C. 5727.02 in passing, indicating that the statute differentiated "between 'primary' and 'incidental' business activities of various public utilities referenced within R.C. Chapter 5727." Yet the BTA did not analyze or apply R.C. 5727.02 to this matter. We find that the BTA erred in failing to construe R.C. 5727.01 in pari materia with R.C. 5727.02.

{¶ 16} For the 2001 tax year, R.C. 5727.02 provided:

{¶ 17} "As used in this chapter, 'public utility,' 'electric company,' 'natural gas company,' 'pipe-line transportation company' or 'heating company' does not include any of the following:

{¶ 18} "(A) Any person that is engaged in some other primary business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental." See Am.Sub.S.B. No. 3, 148 Ohio Laws, Part IV, 7962, 8080.

{¶ 19} The first rule of statutory construction is to look at the statute's language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms. Lancaster Colony Corp. v. Limbach (1988), 37 Ohio St.3d 198, 199, 524 N.E.2d 1389. Courts may not delete words used or insert words not used. Cline v. Ohio Bur. of Motor Vehicles (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77.

{¶ 20} We hold that R.C. 5727.02 establishes a primary-business test for determining whether an entity is a public utility for tax purposes and also for

distinguishing between types of public utilities. "Public utility" is one of the entities to which the statute applies. But the statute also applies to an electric company, natural gas company, pipeline company, water-works company, water-transportation company, or heating company. R.C. 5727.02 separates these classifications by use of the word "or," which is defined "as a function word indicating an alternative between different or unlike things." Pizza v. Sunset Fireworks Co., Inc. (1986), 25 Ohio St.3d 1, 4-5, 25 OBR 1, 494 N.E.2d 1115. See also R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage"). The General Assembly's use of the disjunctive "or," as opposed to the conjunctive "and," indicates that the classifications are intended to be read separately from each other, and public utility is only one of the classifications to which R.C. 5727.02 applies.

{¶ 21} Construed in pari materia with R.C. 5727.01, R.C. 5727.02(A) applies to those public utilities defined in R.C. 5727.01 as engaged in the business of supplying a particular commodity (e.g., electricity, heat, natural gas). Accordingly, R.C. 5727.02(A) would except a company from one or more of the public-utility classifications in its first paragraph if that company is engaged in some other primary business to which supplying a particular commodity is incidental. Indeed, the BTA has previously construed R.C. 5727.02 in the same manner. See Cent. Trust Co. v. Lindley (July 25, 1979), B.T.A. No. 78-C-244 (reading R.C. 5727.01 and 5727.02 in pari materia to find that company was not a "heating company" because it primarily engaged in another business and only incidentally supplied

steam to others); Chrysler Corp. v. Tracy (Jan. 21, 1994), B.T.A. No. 91-K-1523, 1994 WL 19032, at *11, affirmed on other grounds (1995), 73 Ohio St.3d 26, 652 N.E.2d 185 (adopting the reasoning of Cent. Trust to find that company was not a natural gas company because it was primarily engaged in marketing natural gas rather than supplying natural gas to consumers).

{¶ 22} Columbia counters that if it falls outside the definition of "natural gas company" because it engages in some other primary business to which supplying natural gas is incidental, then it also cannot qualify as a pipeline company, and therefore it is not a public utility. Columbia's argument is without merit for the following reasons.

{¶ 23} First, the General Assembly chose to distinguish between natural gas companies and pipeline companies by defining them differently in R.C. 5727.01(D)(4) and (5). Columbia could be classified as a pipeline company – and hence a public utility – and yet not be a natural gas company, because supplying natural gas is only incidental to its primary business of transporting natural gas.

{¶ 24} Second, pipeline companies are not included in the list of companies that are excepted by R.C. 5727.02(A). The first paragraph of R.C. 5727.02 lists those entities that can be excepted from the definitions set forth in R.C. 5727.01. R.C. 5727.02(A), however, applies only to those entities supplying electricity, heat, natural gas, water, water transportation, steam, or air to others. A pipeline company is any person "transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state."

(Emphasis added.) R.C. 5727.01(D)(5). Because pipeline companies are those defined as "transporting" rather than "supplying" a commodity, division (A) of R.C. 5727.02 cannot act to except pipeline companies. In short, contrary to Columbia's argument, applying R.C. 5727.02(A) to this matter would not have the effect of disqualifying it as a natural gas company, as a pipeline company, and as a public utility.

{¶ 25} Accordingly, as applied to this matter, R.C. 5727.02(A)(1) provides that a natural gas company does not include "any person that is engaged in some other primary business to which the supplying of * * * natural gas * * * to others is incidental." Thus, although Columbia may fall within the definition of "natural gas company" in R.C. 5727.01(D)(4) by supplying natural gas for lighting, power, or heating purposes to consumers within this state, according to R.C. 5727.02(A), it may not be considered a natural gas company for the purpose of taxing a public utility if it is engaged in some other primary business to which supplying natural gas to others is incidental.

{¶ 26} Columbia's Primary Business. The evidence in this case shows that Columbia is primarily engaged in the business of transporting natural gas interstate through a network of pipelines in ten states. Columbia offers "a variety of services related to the movement of natural gas, specifically transportation," as well as services involving the underground storage of natural gas.

{¶ 27} Testimony before the BTA indicated that Columbia's primary customers are natural gas companies and natural gas marketers. Natural gas companies, generally termed local distribution

companies ("LDCs"), are companies that distribute natural gas by receiving gas from a pipeline company's transmission system and delivering the gas to the end user.[4] Marketers use Columbia's pipeline capacity to provide bundled natural gas services for their customers.

{¶ 28} Columbia does not own any of the natural gas that it transports, nor does it own any distribution or supplying property. Further evidence revealed that Columbia's pipelines are not configured to provide a substantial delivery service to residential customers.

{¶ 29} Columbia does have "direct-connect customers," i.e., customers that receive gas directly from a Columbia transmission pipeline rather than from an LDC. Columbia's direct-connect customers include power companies, industrial customers, and farm-tap customers. In fact, Columbia has almost 32,000 farm-tap customers.

{¶ 30} However, according to Carl Levander, a vice president for Columbia's parent corporation, NiSource, these customers represent a "finite universe" of end-use customers who are located in close proximity to Columbia's pipelines. Moreover, the volume of gas transported to these direct-connect customers is a "relatively small percentage" and the revenue generated from these customers is "minimal compared to the total revenues" generated from

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[4] LDCs located in Ohio satisfy the definition of "natural gas company." R.C. 4905.03(A)(6); see generally Gen. Motors Corp. v. Tracy (1997), 519 U.S. 278, 282, 117 S.Ct. 811, 136 L.Ed.2d 761.

Columbia's transmission business. Indeed, according to Columbia's Ohio Public Utility Gross Receipts Tax Reports for tax years 2000 and 2001, Columbia did not report any revenue from natural gas distribution; all receipts were from natural gas transmission.

{¶ 31} In sum, the vast majority of Columbia's pipeline business is the interstate transportation of natural gas. Any natural gas supplied to its direct-connect customers is incidental to Columbia's primary business as a pipeline company. Thus, pursuant to R.C. 5727.02(A), Columbia does not fall within the definition of a natural gas company in R.C. 5727.01(D)(4).

Columbia's Contrary Arguments

{¶ 32} Columbia contends that an Ohio taxpayer that transports natural gas interstate by pipeline and delivers natural gas, directly and indirectly, to Ohio consumers satisfies the definition of a "natural gas company" in R.C. 5727.01(D)(4) and is entitled to be taxed as a natural gas company under R.C. 5727.111(C). Columbia maintains that delivering natural gas to even a small number of consumers, and especially to large-volume consumers such as its power and industrial customers, is adequate to put Columbia in the business of supplying and distributing natural gas.

{¶ 33} Columbia's primary argument to support this claim is that statutes imposing a tax are to be construed strictly against the state and liberally in favor of the taxpayer. According to Columbia, because it satisfies the definition of both a natural gas company under R.C. 5727.01(D)(4), and a pipe-line company under R.C. 5727.01(D)(5), the statutes must

be construed to give Columbia the benefit of the more favorable category.

{¶ 34} Columbia is correct that a statute that imposes a tax requires strict construction against the state, with any doubt resolved in favor of the taxpayer. See Gulf Oil Corp. v. Kosydar (1975), 44 Ohio St.2d 208, 73 O.O.2d 507, 339 N.E.2d 820, paragraph one of the syllabus; Lancaster Colony Corp., 37 Ohio St.3d at 199, 524 N.E.2d 1389; Lakefront Lines, Inc. v. Tracy (1996), 75 Ohio St.3d 627, 629, 665 N.E.2d 662. But rules of strict construction do not apply if the statutory language is plain and unambiguous, because such statutes are to be applied as written, not construed in any party's favor. See Storer Communications v. Limbach (1988), 37 Ohio St.3d 193, 194, 525 N.E.2d 466; Lancaster Colony Corp., 37 Ohio St.3d at 199, 524 N.E.2d 1389. R.C. 5727.02(A) clearly excepts Columbia from the definition of natural gas company in R.C. 5727.01(D)(4) because Columbia's primary business is interstate natural gas transportation and not local distribution.

{¶ 35} Moreover, we have rejected the strict-construction doctrine when its application would result in unreasonable or absurd consequences. See CC Leasing Corp. v. Limbach (1986), 23 Ohio St.3d 204, 207, 23 OBR 364, 492 N.E.2d 421. Indeed, it is the function of courts to construe statutory language to effect a just and reasonable result. Gulf Oil Corp., 44 Ohio St.2d 208, 73 O.O.2d 507, 339 N.E.2d 820, paragraph two of the syllabus. See also R.C. 1.47(C) (in enacting a statute, it is presumed that a just and reasonable result is intended).

{¶ 36} It would be unreasonable to tax Columbia's entire property under the lower natural-gas-company rate when Columbia's pipeline and equipment are primarily used in transporting natural gas and not in supplying gas to end-user consumers. Columbia would have us tax its personal property based on a minor incidental use, rather than its major and primary use. But Columbia's interpretation of R.C. 5727.01(D)(4) and (5) would blur the distinction between natural gas companies and pipeline companies. Indeed, were we to accept Columbia's position, an interstate-pipeline company supplying natural gas to even one end-use consumer could be classified as an Ohio natural gas company for the purpose of taxing the personal property of a public utility.

{¶ 37} Columbia additionally claims that by delivering natural gas to LDCs for subsequent delivery to the end-use customers of the LDCs, Columbia is supplying natural gas to Ohio consumers. Yet one is a natural gas company only when "supplying natural gas for lighting, power, or heating purposes to consumers within this state." R.C. 5727.01(D)(4). When Columbia transports natural gas to LDCs, who then deliver the gas to end-use consumers, it is not "supplying" natural gas to the LDCs for the purposes contemplated by R.C. 5727.01(D)(4). See Chrysler Corp. v. Tracy, 73 Ohio St.3d 26, 652 N.E.2d 185. Under Columbia's interpretation, all pipeline companies would automatically qualify as Ohio natural gas companies simply by transporting gas to an LDC's distribution facility. That cannot be the construction intended by the General Assembly.

Conclusion

{¶ 38} Based on the foregoing, we find that the BTA erred in failing to construe R.C. 5727.01 in pari materia with R.C. 5727.02. R.C. 5727.02(A) establishes a primary-business test for purposes of defining a natural gas company pursuant to R.C. 5727.01(D)(4). Because Columbia is primarily engaged in the business of a pipeline company, it is not a natural gas company for purposes of Ohio's personal property tax on public utilities. Accordingly, we reverse the decision of the BTA. Columbia Gas Transmission's Cross-Appeal

{¶ 39} Columbia has filed a protective cross-appeal contending that the assessment of its personal property at the 88 percent rate for pipeline companies is impermissible as a matter of constitutional law. We reject each of Columbia's constitutional challenges.

Due Process

{¶ 40} In proposition of law No. 2, Columbia maintains that under the Tax Commissioner's interpretation, R.C. 5727.01(D)(4) and (5) fail to adequately define tax classifications subject to different assessment rates and are void for vagueness on their face and as applied, in violation of due process protections in the Ohio and United States Constitutions.

{¶ 41} A court's power to invalidate a statute "is a power to be exercised only with great caution and in the clearest of cases." Laws are entitled to a "strong presumption of constitutionality," and the party challenging the constitutionality of a law "bears the burden of proving that the law is unconstitutional beyond a reasonable doubt." Yajnik v. Akron Dept. of

Health, Hous. Div., 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16; Buckley v. Wilkins, 105 Ohio St.3d 350, 2005-Ohio-2166, 826 N.E.2d 811, ¶ 18.

{¶ 42} "When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement." Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 84, citing Kolender v. Lawson (1983), 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903. Moreover, laws directed to economic matters are subject to a less strict vagueness test than laws interfering with the exercise of constitutionally protected rights. Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982), 455 U.S. 489, 498-499, 102 S.Ct. 1186, 71 L.Ed.2d 362.

{¶ 43} **Facial Challenge.** A court examining a facial-vagueness challenge to a statute that implicates no constitutionally protected conduct will uphold that challenge only if the statute is impermissibly vague in all of its applications. Hoffman Estates, 455 U.S. at 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362. Yet Columbia makes no claim or showing that the statutes are invalid in all applications. Therefore, we reject Columbia's facial challenge.

{¶ 44} **As-Applied Challenge.** Columbia claims that when a company both transports natural gas and supplies it to consumers, the definitions of "natural gas company" and "pipeline company" provide no

objective basis for classifying that company as one or the other. Thus, according to Columbia, the Tax Commissioner lacks legislative guidance and must simply decide for himself under which classification the company falls. In Columbia's view, the Tax Commissioner's "subjective" decision is "wholly unconstrained" and opens the door to arbitrary and discriminatory application.

{¶ 45} Columbia makes a blanket assertion that "[u]nder any meaningful vagueness standard, the statute here fails. * * * It attempts to draw a tax-determinative distinction between those companies that 'supply' natural gas and those that 'transport' natural gas – a distinction that in today's natural gas market is 'substantially incomprehensible.' " Quoting Buckley v. Wilkins, 105 Ohio St.3d 350, 2005-Ohio-2166, 826 N.E.2d 811, ¶ 19.

{¶ 46} A civil statute that does not implicate the First Amendment is unconstitutionally vague only if it is so vague and indefinite that it sets forth no standard or rule or if it is substantially incomprehensible. Id.; Hoffman Estates, 455 U.S. at 495, 102 S.Ct. 1186, 71 L.Ed.2d 362, fn. 7. Moreover, the void-for-vagueness doctrine "does not require statutes to be drafted with scientific precision." Perez v. Cleveland (1997), 78 Ohio St.3d 376, 378, 678 N.E.2d 537.

{¶ 47} R.C. 5727.01(D)(4) and (5) set forth specific definitions that clearly distinguish between natural gas companies, which supply natural gas, and pipeline companies, which transport natural gas. These are well-understood industry terms that track the clear division between state and federal regulations of the natural gas industry. See Natural

Gas Act of 1938, Section 717(b), Title 15, U.S.Code (defining FERC's jurisdiction over the interstate transportation of natural gas and exempting local distribution of gas from the Act); R.C. Chapter 4905 (PUCO has regulatory oversight over utilities that locally supply natural gas to end-user consumers in Ohio). Furthermore, R.C. 5727.02 establishes a primary-business test for distinguishing between the types of public utilities listed in R.C. Chapter 5727. Thus, the statutes provide standards for determining whether a company is classified as one or the other, and there is no basis for finding that the statutes encourage arbitrary and discriminatory enforcement on the part of the Tax Commissioner.

{¶ 48} Moreover, the availability of administrative remedies and appellate review acts to check any threat of arbitrary and discriminatory enforcement. See Perez v. Cleveland, 78 Ohio St.3d at 379, 678 N.E.2d 537, citing United States ex rel. Fitzgerald v. Jordan (C.A.7, 1984), 747 F.2d 1120, 1130. See also Hoffman Estates, 455 U.S. at 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (a "regulated enterprise may have the ability to clarify the meaning of [a] regulation by its own inquiry, or by resort to an administrative process"). The Tax Commissioner's initial assessment was based on Columbia's own Annual Ohio Public Utility Property Tax Natural Gas Pipeline Company Reports. Columbia was able to object to the Tax Commissioner's initial assessments by filing a petition for reassessment. Columbia was then able to appeal the Tax Commissioner's final determination to the BTA. Finally, Columbia had an appeal as of right to this court. Thus, contrary to Columbia's assertion, the Tax Commissioner's determination was not "wholly unconstrained."

{¶ 49} In sum, Columbia has not shown that the statutes invite subjective or discriminatory enforcement. See Grayned v. Rockford (1972), 408 U.S. 104, 113, 92 S.Ct. 2294, 33 L.Ed.2d 222. Because Columbia has not met its burden of showing that the statutes here are unconstitutional beyond a reasonable doubt, we overrule its second proposition of law.

Federal Commerce Clause

{¶ 50} Columbia contends in proposition of law No. 3 that where a federally regulated interstate-pipeline company competes in serving the same transportation and storage functions as state-regulated LDCs, the Commerce Clause forbids assessing the interstate pipeline's property at a higher rate than that of the competing LDCs.

{¶ 51} The Commerce Clause grants Congress the power "[t]o regulate Commerce * * * among the several States." Clause 3, Section 8, Article I, United States Constitution. The United States Supreme Court has recognized a negative or "dormant" Commerce Clause power that "prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace,' " (Citations omitted.) Gen. Motors Corp. v. Tracy (1997), 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761, quoting Reeves, Inc. v. Stake (1980), 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244.

{¶ 52} Under consideration in Gen. Motors Corp. v. Tracy, 73 Ohio St.3d at 30, 652 N.E.2d 188, was an Ohio statute that imposed a general sales tax on sales of natural gas in the state and a use tax on natural gas purchases out-of-state. Ohio's tax scheme

exempted natural gas sales by entities that met the definition of "natural gas company" under R.C. 5727.01(D)(4). It was undisputed that natural gas utilities, or LDCs, located in Ohio satisfied the definition of "natural gas company." General Motors, a buyer of natural gas from an out-of-state marketer, challenged the exemption of LDCs from the sales and use tax imposed on sellers of natural gas. We found that non-LDC gas sellers, such as producers and independent marketers, were not natural gas companies under R.C. 5727.01(D)(4); therefore, their sales were outside the exemption and subject to the tax. Id., citing Chrysler Corp. v. Tracy, 73 Ohio St.3d 26, 652 N.E.2d 185 (both cases were issued the same day).

{¶ 53} The United States Supreme Court held that there was no Commerce Clause violation in Gen. Motors Corp. because the supposedly favored and disfavored entities were not similarly situated. 519 U.S. at 310, 117 S.Ct. 811, 136 L.Ed.2d 761. Specifically, the court found that the out-of-state marketers did not serve the LDCs' core market of small, captive end users of natural gas, including residential customers who wanted or needed bundled natural gas services and the protections afforded by utility regulation, and small-volume buyers who would not benefit economically from purchasing gas on the open market. Id. at 301-302, 117 S.Ct. 811, 136 L.Ed.2d 761. In short, the court premised its holding that Ohio's tax scheme was not facially discriminatory on the view that LDCs and independent marketers were principally serving different markets.

{¶ 54} Gen. Motors Corp. recognized that before a finding of discrimination under the Commerce Clause could be made, different treatment must be accorded to substantially similar entities. The court found that, where the allegedly competing entities provide different products, the threshold question is whether the companies are similarly situated for constitutional purposes. "This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." Id. at 299, 117 S.Ct. 811, 136 L.Ed.2d 761. Therefore, we must first decide whether interstate-pipeline companies and LDCs are similarly situated.

{¶ 55} Columbia maintains that there are no relevant differences between interstate pipelines and LDCs that justify assessing interstate-pipeline companies at an 88 percent valuation rate and LDCs at 25 percent. See R.C. 5727.111(C), (D). We disagree.

{¶ 56} As in Gen. Motors Corp., the statutory scheme favors certain entities that satisfy the definition of a natural gas company in R.C. 5727.01(D)(4). Moreover, as in Gen. Motors Corp., the allegedly favored and disfavored entities here principally serve different markets.

{¶ 57} The evidence in this case shows that interstate-pipeline companies do not compete with

Ohio LDCs to service the residential and small commercial end-use natural gas consumer. Interstate-pipeline companies, like Columbia, primarily transport natural gas interstate from production areas to LDCs. The primary customers of interstate pipelines are not residential or small-volume-end-use consumers, but LDCs and independent and LDC-affiliated natural gas marketers. Even after significant restructuring of the natural gas industry, the core market of Ohio LDCs remains retail sales and distribution of natural gas to residential and small commercial end-use consumers.

{¶ 58} "[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." Gen. Motors Corp., 519 U.S. at 300, 117 S.Ct. 811, 136 L.Ed.2d 761. Because interstate-pipeline companies, like Columbia, and Ohio LDCs do not compete in the same market, they are not "similarly situated" for Commerce Clause purposes. Thus, we reject this claim. Columbia's Contrary Commerce Clause Arguments

{¶ 59} Columbia contends that interstate pipelines and LDCs are "substantially similar" for Commerce Clause purposes. In Columbia's view, interstate pipelines and LDCs are part of the same natural gas distribution network, own the same sorts of property, and compete with one another in various ways.

{¶ 60} LDC Transmission Property. In Columbia's view, LDCs do more than merely engage in the local distribution of natural gas to end users; rather, Columbia maintains that the evidence shows that LDCs are also engaged in the "transmission" of natural gas in direct competition with interstate-pipeline companies.

{¶ 61} Columbia submitted evidence to the BTA in an attempt to show that Ohio LDCs own and operate significant amounts of transmission pipeline. Columbia relied heavily on reports filed with the United States Department of Transportation's Office of Pipeline Safety, which distinguishes between transmission and distribution based on the size and pressure strength of the pipeline.

{¶ 62} Columbia's evidence in this regard is not persuasive. For public-utility-tax purposes, the Tax Commissioner has adopted FERC definitions that distinguish between interstate transportation or transmission and local distribution of natural gas. See Natural Gas Act of 1938, Section 717(B), Title 15, U.S.Code. According to the FERC, pipeline diameter and pressure are not controlling for purposes of distinguishing between interstate transportation and local distribution. See Midwestern Gas Transm. Co. (May 12, 1999), FERC No. CP98-538-001, 1999 WL 298625, at *7. Rather, the FERC defines interstate transportation as beginning at the point where the interstate pipeline receives gas from the gathering or production area and ending at the point where the interstate pipeline delivers gas into the LDC's distribution facility (commonly known as the "city gate"). See Part 201(29)(B), Title 18, C.F.R. See also Midwestern Gas Transm. Co. (Dec. 16, 1998), FERC

No. CP98-538-000, 1998 WL 878038, at *4 (local distribution – as opposed to interstate transportation – connotes a network of small local lines used to transmit gas from a large interstate pipeline to individual consumers spread out in a local geographic area).

{¶ 63} Furthermore, both FERC and federal courts have found that the transportation of natural gas by an interstate pipeline directly to an end-user constitutes transportation in interstate commerce, not local distribution. See Oklahoma Natural Gas Co. v. Fed. Energy Regulatory Comm. (C.A.D.C.1990), 906 F.2d 708, 710; Pub. Utils. Comm. of California v. Fed. Energy Regulatory Comm. (C.A.D.C.1990), 900 F.2d 269, 277.

{¶ 64} Nevertheless, Columbia claims that the FERC-defined "'distribution area' is a subjective concept, and is often treated as simply referring to a point where natural gas is transferred from an upstream pipeline company to a downstream LDC" and that "[e]ven under this location-driven definition, several Ohio LDCs identify a significant portion of their property as 'transmission' rather than 'distribution.' " However, Columbia's argument ignores the testimony of its own witnesses that the term "transmission" is also largely subjective and can have different meanings for purposes of utility ratemaking, safety, and taxation. In fact, in several instances, Columbia witnesses referred to LDC-owned "transmission" pipelines that FERC would have classified as "distribution" pipelines.

{¶ 65} Moreover, Columbia's witnesses had no specific knowledge whether this "transmission" property was actually used by LDCs to provide

transportation or distribution services. Finally, other testimony indicated that, whether designated as transmission or distribution, LDC-owned pipelines were primarily used to distribute gas to end-use customers. In short, Columbia's evidence does not show that interstate-pipeline companies are competing with LDCs for the same transportation-service customers.

{¶ 66} Direct Competition Between Interstate Pipelines and LDCs. Columbia claims that interstate-pipeline companies compete directly with Ohio LDCs in (1) directly delivering gas to large industrial and electric power end users and farm-tap customers, (2) providing storage services, and (3) providing gathering or production services. However, as the Tax Commissioner points out, the existence of other areas of actual or potential competition does not alter Gen. Motors Corp.'s holding.

{¶ 67} In Gen. Motors Corp., the court considered whether current or potential competition between marketers and LDCs in the noncaptive (nonresidential) market requires treating marketers and LDCs alike for dormant Commerce Clause purposes. That is, the court decided whether to "accord controlling significance to the noncaptive market in which they compete, or to the noncompetitive, captive market in which the local utilities alone operate." Gen. Motors Corp., 519 U.S. at 303-304, 117 S.Ct. 811, 136 L.Ed.2d 761.

{¶ 68} The court found that "a number of reasons support a decision to give the greater weight to the captive market and the local utilities' singular role in serving it, and hence to treat marketers and LDCs as dissimilar for present purposes." Id. at 304, 117 S.Ct.

811, 136 L.Ed.2d 761. Significantly, the court recognized the importance of traditional regulated service to the captive market and an obligation to proceed cautiously so as not to jeopardize the LDCs' continuing capacity to serve that market. Id. The court further noted that states have an important stake in protecting the captive market and that state regulation of natural gas sales to local consumers serves important interests in health and safety, including requiring a dependable supply and ensuring that residential customers are not frozen out of their houses in cold months. Id. at 306, 117 S.Ct. 811, 136 L.Ed.2d 761.

{¶ 69} Those interests are no less relevant to this matter than they were in Gen. Motors Corp. Ohio continues its regulation of natural gas rates and services to the benefit of residential and other small-volume users. See R.C. 4905.22 (requiring just and reasonable rates and adequate service and facilities) and R.C. 4905.14(B) (requiring each natural gas company to submit annual forecasts of future gas supply and demand). Ohio requires LDCs to serve all customers and ensure access to natural gas without discrimination. See R.C. 4905.02, 4905.03(A)(6), 4905.06, and 4905.35. See also R.C. 4929.02(A)(1) and (9) and 4929.03. Ohio also protects residential customers by requiring LDCs to follow certain administrative procedures before terminating service, and additional protections are afforded to ensure that Ohio LDCs provide continued service to low-income, elderly, and handicapped residential customers. R.C. 4933.12 and 4933.122; Ohio Adm.Code 4901:1-18. And Ohio LDCs are currently default providers, or providers of last resort, for customers who return to LDCs for natural gas when an alternative supplier

fails to provide service. See R.C. 4929.20(C)(2); Ohio Adm.Code 4901:1-27-12(G), (H), and (J).

{¶ 70} Columbia maintains that since Gen. Motors Corp. was decided, LDCs have unbundled their product and now are able to sell transportation and storage services separately from natural gas, meaning that LDCs directly compete with interstate pipelines that provide the same services. However, Columbia ignores the evidence that LDCs are still primarily serving the same residential and small-business markets that they were serving at the time Gen. Motors Corp. was decided.

{¶ 71} To be sure, LDCs now offer both bundled and unbundled services and, as Columbia notes, they can sell natural gas, transportation service, and storage service separately. Nevertheless, the main competitors of LDCs in the residential and small-business markets are not interstate-pipeline companies. Rather, independent and LDC-affiliated marketers compete with LDCs for commodity sales in this market. Moreover, marketers largely rely on the LDCs' distribution network to deliver their natural gas to end-use customers. In other words, interstate-pipeline companies do not compete for residential and small-business customers for either natural gas sales or transportation services.

{¶ 72} Columbia also maintains that it competes with Ohio LDCs in the residential market in direct delivery of natural gas to farm-tap customers. However, the existence of these farm-tap customers does nothing to support Columbia's claim that it directly competes in the Oho residential market.

{¶ 73} Farm-tap customers were described as rural customers who had been granted the right to tap into

Columbia's interstate-transmission pipeline at the time of construction. These farm taps were often given in exchange for an easement through the customer's land at the time of construction. At best, these farm-tap customers represent a small, unique segment of the residential market. Columbia offered evidence showing that it served over 30,000 farm-tap customers. By way of comparison, Columbia's affiliated LDC, Columbia Gas of Ohio, distributes natural gas to approximately 1.3 million residential customers.

{¶ 74} Columbia's Other Claims. Columbia alternatively argues that Gen. Motors Corp. is distinguishable because (1) it involved a comparison between a regulated utility and a nonregulated marketer, and (2) different taxes (sales and property) were involved. Neither claim has merit.

{¶ 75} First, the outcome in Gen. Motors Corp. did not turn on a comparison between regulated and unregulated entities. Rather, the court determined that LDCs and independent marketers were not "similarly situated" for dormant Commerce Clause purposes because they did not compete in the LDCs' core residential market, and eliminating any tax differential between the LDCs and marketers would not alter the competitive nature of this market. Gen. Motors Corp., 519 U.S. at 297-303, 117 S.Ct. 811, 136 L.Ed.2d 761. Columbia has not shown in this case that it competes with LDCs in the residential market or that it would compete in this market should we rule in its favor.

{¶ 76} Moreover, the fact that Columbia is "heavily regulated" does not make it "similarly situated" to state-regulated LDCs for purposes of the Commerce

Clause. Columbia is a federally regulated interstate-pipeline company. Congress and the courts have long treated federal and state regulation of the natural gas industry separately by exempting local distribution of natural gas from federal regulation. Indeed, the Gen. Motors Corp. court reaffirmed the continuing importance of the states' interest in regulating the local natural gas market, noting that even amidst recent regulatory changes intended to increase competition in the natural gas industry, Congress has done nothing to limit the states' traditional local regulation. See Gen. Motors Corp., 519 U.S. at 288-297, 117 S.Ct. 811, 136 L.Ed.2d 761 (describing historical evolution of natural gas industry and Congress's recognition of states' vital role in regulating the local market).

{¶ 77} Second, Gen. Motors Corp. also did not turn on the nature of the tax involved. In fact, the court suggested that the nature of the challenged tax was largely irrelevant in light of Ohio's complicated public-utility-property-taxation scheme, which subjects public utilities and nonutilities alike to an array of different tax burdens. Gen. Motors Corp., 519 U.S. at 307-308, 117 S.Ct. 811, 136 L.Ed.2d 761, fn. 16.

{¶ 78} In conclusion, Columbia's failure to show that it is in direct competition with Ohio LDCs in the residential market proves fatal to its dormant Commerce Clause claim. Therefore, Columbia's third proposition of law is overruled.

Federal Supremacy Clause

{¶ 79} Columbia argues in proposition of law No. 4 that assessing the personal property of interstate-pipeline companies at a higher rate than that of

LDCs and general businesses with which interstate-pipeline companies compete impairs and is inconsistent with federal regulatory authority and violates the Supremacy Clause of the United States Constitution.

{¶ 80} The Supremacy Clause of Article IV of the United States Constitution is the source of Congress's power to preempt state law. "Preemption may be express or implied, but in either case, the question is one of congressional intent." Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co. (C.A.6, 989), 887 F.2d 1295, 1300, citing California Fed. S. & L. Assn. v. Guerra (1987), 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613. In the absence of express statutory language, Congress may implicitly intend to occupy a given field to the exclusion of state law. Such intent may be properly inferred if (1) the pervasiveness of the federal regulation precludes supplementation by the states, (2) the federal interest in the field is sufficiently dominant, or (3) the object of the federal law and the obligations imposed by it reveal the same purpose. Finally, even if Congress has not entirely displaced state regulation in a particular field, federal law preempts state law when it actually conflicts with federal law. A conflict will be found if it is impossible to comply with both state and federal law, or if the state law is an obstacle to fulfilling the purposes and objectives of Congress. Michigan Consol. Gas Co., 887 F.2d at 1300-1301, citing Schneidewind v. ANR Pipeline Co. (1988), 485 U.S. 293, 299-300, 108 S.Ct. 1145, 99 L.Ed.2d 316.

{¶ 81} Columbia raises three distinct claims that Ohio's different assessment rates are incompatible with FERC's pervasive regulation of wholesale sales

and interstate transportation of natural gas. We address each in turn.

{¶ 82} First, Columbia argues that the different assessment rates conflict with FERC's ratemaking authority by interfering with the ability of federally regulated pipelines to pass along costs to their customers. Columbia complains that the discriminatory nature of Ohio's tax places interstate-pipeline companies at a competitive disadvantage that requires them to discount their FERC-approved rates.[5]

{¶ 83} Columbia's argument assumes that interstate-pipeline companies and LDCs compete in the segment of the natural gas market under FERC's exclusive regulatory jurisdiction. See generally Pub. Util. Comm. of California v. Fed. Energy Regulatory Comm., 900 F.2d at 274-276 (describing FERC's jurisdiction over interstate transportation of natural gas and the states' authority over local distribution). Yet the record here fails to show any direct or significant competition between interstate-pipeline companies and Ohio LDCs for the interstate transportation of natural gas, i.e., from gathering or production areas to local distribution areas. Moreover, the evidence indicated that discounting was a function of the market and that state taxes were only one of several factors that led interstate-pipeline companies to offer discounted rates. Thus, there is no merit to Columbia's claim that Ohio's higher

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[5] According to testimony, interstate pipelines may charge no more than their FERC-approved tariffed rates but may offer rates below their full tariffs.

assessment rate conflicts with FERC's ability to regulate the rates of interstate-pipeline companies.

{¶ 84} Second, Columbia maintains that Ohio's different assessments undermine FERC policies favoring free competition in the market of natural gas gathering. However, there is no evidence here that any interstate-pipeline companies owned or operated natural gas gathering or production facilities in Ohio during the tax years in question. Thus, it is difficult to see how Columbia – or any interstate-pipeline company – was disadvantaged by a lower assessment rate on gathering facilities owned by Ohio LDCs or general businesses.

{¶ 85} Third, Columbia contends that Ohio's tax structure interferes with recent FERC efforts to encourage interstate-pipeline direct connections to end users. According to Columbia, the different assessment rates directly interfere with Columbia's ability to obtain direct connections.

{¶ 86} Yet a number of factors affect whether FERC will approve a proposed direct connection or bypass facility. These factors include, among others, the environmental impact of the proposed project, whether landowners are inconvenienced, whether economically superior alternatives are available, the existence of other transmission and distribution facilities in the area, whether system access and reliability will be enhanced by the project, and whether proposed transportation rates resulted from unfair competition or discriminatory behavior. See generally Midcoast Interstate Transm., Inc., v. Fed. Energy Regulatory Comm. (C.A.D.C.2000), 198 F.3d 960; Midwestern Gas Transm., FERC No. CP98-538-000, 1998 WL 878038.

{¶ 87} Undoubtedly, state taxes would play a role in any pipeline-construction project. However, Congress does not preempt "every state statute that has some indirect effect on rates and facilities" of interstate-pipeline companies. See Schneidewind, 485 U.S. at 308, 108 S.Ct. 1145, 99 L.Ed.2d 316. Here, Columbia has offered no credible evidence that Ohio's assessment rate on the property of an interstate-pipeline company interferes with FERC's regulation of direct connections or in any way restricts such arrangements.

{¶ 88} Accordingly, Columbia's proposition of law No. 4 is overruled.

Equal Protection

{¶ 89} Columbia contends in proposition of law No. 5 that assessing the personal property of interstate-pipeline companies at 88 percent while applying a 25 percent assessment rate to the property of Ohio LDCs and general businesses with which the interstate pipelines compete violates the Equal Protection Clauses of the United States and Ohio Constitutions.

{¶ 90} "The limitations placed upon governmental action by the federal and state Equal Protection Clauses are essentially the same." McCrone v. Bank One Corp., 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 7. The Equal Protection Clauses require that all similarly situated individuals be treated in a similar manner. Id. at ¶ 6.

{¶ 91} A statutory classification that involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clauses if it bears a rational relationship to a legitimate governmental interest. Menefee v. Queen City Metro (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181. Under the

rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification. Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ. (1999), 87 Ohio St.3d 55, 58, 60, 717 N.E.2d 286. Rather, the assessment of taxes is fundamentally a legislative responsibility and a taxpayer challenging the constitutionality of a taxation statute bears the burden to negate every conceivable basis that might support the legislation. Lyons v. Limbach (1988), 40 Ohio St.3d 92, 94, 532 N.E.2d 106.

{¶ 92} Moreover, "[t]his already deferential standard 'is especially deferential' in the context of classifications arising out of complex taxation law." Park Corp. v. Brook Park, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913, ¶ 23, quoting Nordlinger v. Hahn (1992), 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1. States have great leeway in making classifications and drawing lines that in their judgment produce reasonable systems of taxation. See Nordlinger, 505 U.S. at 11, 112 S.Ct. 2326, 120 L.Ed.2d 1.

{¶ 93} **Equal Protection – LDCs and Interstate Pipelines.** In Gen. Motors Corp., the Supreme Court found that there was a rational basis for treating LDCs and independent marketers differently for tax purposes. 519 U.S. at 311- 312, 117 S.Ct. 811, 136 L.Ed.2d 761. Accordingly, Columbia's claim that Ohio's tax scheme violates the Equal Protection Clauses by treating LDCs and interstate pipeline companies differently is rejected.

{¶ 94} **Equal Protection – Interstate Pipelines and Alternative-Fuel Suppliers.** Columbia also claims that the Tax Commissioner denied it equal protection

of the laws because he taxed the personal property of interstate-pipeline companies at a higher assessment rate than the personal property of Ohio taxpayers that transport "alternative fuels."[6] Columbia contends that natural gas and alternative fuels – including coal and refined petroleum products such as fuel oil and propane – are competing fuels, and that there is no rational basis for different assessment rates on interstate-pipeline companies and transporters of alternative fuels.

{¶ 95} However, "[t]he fact that one business competes with another does not, of itself, mean that the two companies are similarly situated for purposes of equal protection." GTE N., Inc. v. Zaino, 96 Ohio St.3d 9, 2002-Ohio-2984, 770 N.E.2d 65, ¶ 39. Thus, in determining whether R.C. 5727.111 deprives Columbia of the constitutional right of equal protection, we must first determine whether Columbia is similarly situated to Ohio taxpayers that transport alternative fuels. GTE N. at ¶ 23.

{¶ 96} First, the record before us contains insufficient evidence concerning the operations of those alternative-fuel suppliers with which Columbia claims to compete. Thus, because the record is not factually sufficient to make a valid comparison between the transportation and uses of alternative fuels and those services provided by interstate pipeline companies, we may reject Columbia's claim on that ground alone. See Lyons v. Limbach, 40 Ohio St.3d at 94, 532 N.E.2d 106.

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[6] One Columbia witness defined alternative fuels as a substitute for natural gas that is used for heating or for power generation.

{¶ 97} Second, Columbia, an interstate-pipeline company, has not shown that it is similarly situated to Ohio businesses that transport alternative fuels. Columbia transports natural gas interstate solely by pipeline. In contrast, the transporters of alternative fuels use several different means to transport their products, including pipelines, tanker trucks, rail cars, and barges. Distinctive features also exist among the products being transported. For instance, industrial and electric-power plants are limited in the number of hours that they can burn certain alternative fuels, such as coal and fuel oil, because of the emissions those fuels produce when burned.

{¶ 98} Third, Columbia has not negated every conceivable basis that might support the legislation. Columbia offers little more than a blanket assertion that there is no identified or apparent rational basis for the differing assessments on the property of an interstate-pipeline company and the property of a transporter of alternative fuel. Our job is simply to determine, with great deference, whether there is a rational basis for the General Assembly's taxation decisions. See Park Corp. v. Brook Park, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913, ¶ 36. Each of the distinctions cited above could provide a rational basis for treating these businesses differently than interstate pipeline companies. Any variations in the costs of transportation, fuels, labor, insurance, taxes, or regulatory obligations could provide a rational basis for assessing these companies at a lower rate.

{¶ 99} Columbia raises a similar claim that Ohio's tax scheme violates equal protection because the personal property of interstate-pipeline companies

that provide natural gas gathering services in Ohio is taxed higher than the personal property of Ohio taxpayers that engage in natural gas gathering. However, between 1993 and 1998, Columbia sold all of its gathering facilities. Thus, Columbia is not within the class of taxpayers that it claims are the victims of the purportedly irrational classifications. Because Columbia is not a gatherer or producer of natural gas in Ohio, it lacks standing to attack the statute's constitutionality on the ground that it violates others' rights to equal protection. See State ex rel. Harrell v. Streetsboro City School Dist. Bd. of Edn. (1989), 46 Ohio St.3d 55, 63, 544 N.E.2d 924.

{¶ 100} Even if Columbia had standing to raise this particular equal-protection claim, Columbia has not met its burden of negating every conceivable basis that might support legislation treating these entities differently.

{¶ 101} Accordingly, Columbia's equal-protection claims lack merit and we reject proposition of law No. 5.

Conclusion

{¶ 102} The BTA erred in finding that Columbia was a natural gas company under R.C. 5727.01(D)(4) for the purpose of taxing the personal property of a public utility. The BTA failed to consider R.C. 5727.02, which establishes a primary-business test for purposes of R.C. 5727.01. Because Columbia is primarily engaged in the interstate transportation of natural gas, the Tax Commissioner correctly found that Columbia was a pipeline company under R.C. 5727.01(D)(5) and properly assessed Columbia's personal property at the 88 percent pipeline-company rate in R.C. 5727.111(D).

{¶ 103} In addition, none of Columbia's constitutional challenges have merit. Accordingly, Columbia's cross-appeal is overruled.

Decision reversed.

MOYER, C.J., and LUNDBERG STRATTON, O'DONNELL, and LANZINGER,

JJ., concur.

PFEIFER and O'CONNOR, JJ., concur in judgment only.

Jones Day, Maryann B. Gall, Phyllis J. Shambaugh, Todd Swatsler, and Kasey T. Ingram, for appellee and cross-appellant Columbia Gas Transmission Corporation.

Marc Dann, Attorney General, Barton A. Hubbard and Janyce C. Katz, Assistant Attorneys General, and Cheryl D. Pokorny, Deputy Attorney General, for appellant and cross-appellee, Tax Commissioner of Ohio.

Taft, Stettinius & Hollister, L.L.P., and Fred J. Livingstone, urging reversal for amicus curiae Ohio School Boards Association.

Thelen, Reid, Brown, Raysman & Steiner, L.L.P., and Andrea Wolfman, urging affirmance for amicus curiae Interstate Natural Gas Association of America.

OHIO BOARD OF TAX APPEALS

Columbia Gas Transmission Corp.,
Appellant,

vs.

Thomas M. Zaino, Tax Commissioner
of Ohio,
Appellee.

CASE NO. 2003-K-1876
(PUBLIC UTILITY PERSONAL PROPERTY TAX)

DECISION AND ORDER
Entered: July 28, 2006

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Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

Through the present appeal, appellant, Columbia Gas Transmission Corporation, challenges a final determination of the Tax Commissioner in which he denied appellant's petitions for reassessment and affirmed public utility property tax assessments as originally issued for tax years 2000 and 2001. We now proceed to consider this matter upon appellant's notice of appeal, the statutory transcript certified by the commissioner, the record of the evidentiary hearing convened before this board, and the post-hearing briefs submitted on behalf of the parties. Consistent with the requirement imposed upon it by R.C. 5727.08, and within the extended period allowed by R.C. 5727.48, appellant filed its 2000 and 2001 annual reports with the Tax Commissioner. For each of these years, the commissioner issued preliminary assessment certificates setting forth the proposed values of appellant's taxable property to which he then applied an assessment rate of 88% of true value applicable to pipe-line companies. As previously indicated, appellant filed petitions for reassessment for both tax years 2000 and 2001, including among its arguments, that it satisfied the statutory definition of a natural gas company and was therefore entitled to have its property assessed at the 25% rate applicable to such entities beginning with the 2001 tax year, and, further, that the 88% assessment rate applied to

its property was in violation of rights guaranteed it by both the United States and Ohio Constitutions.[1]

In his final determination, the commissioner denied each of appellant's arguments and the present appeal ensued, with appellant specifying the following as error:

> "*** [2] The Commissioner's final determination is erroneous in its entirety for the following reasons:
>
> "*Specification One*
>
> "*** The assessment[s], and the final determination affirming it [them], erroneously classify Columbia Transmission as a 'pipe-line' company under R.C. 5727.01(D)(5), rather than a 'natural gas company' under R.C. 5727.01(D)(4). Columbia Transmission satisfies the definition of a 'natural gas company' in R.C. 5727.01(D)(4) and, accordingly, its taxable public utility property should be assessed at 25% of

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[1] Appellant also asserted that the value of its personal property had been overstated due to the application of the statutory cost-based valuation method set forth in R.C. 5727.1 1. The commissioner rejected this claim and appellant sought reversal of this determination through its second specification of error. However, during the course of these proceedings, the parties were able to resolve this issue, and, as a result, appellant has withdrawn this specification of error. Accordingly, it is not further addressed herein.

[2] We have omitted the numerical references attributed to the paragraphs set forth in appellant's notice of appeal.

true value, pursuant to R.C. 5727.1 11(C)(2), rather than 88% of true value as assessed by the Commissioner.

"*** R.C. 5727.01(0)(4) provides that an entity 'is a natural gas company when engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within [Ohio] ...[.]' In the final determination, the Commissioner incorrectly found that Columbia Transmission did not supply or distribute gas directly to consumers. In fact, Columbia Transmission did supply and distribute gas directly to consumers, including but not limited to industrial end users, farm tap customers, and local distribution companies that use gas for their own consumption. Cf. Carnegie Natural Gas Co. v. Tracy (Nov. 17, 1995), 1995 WL 691943, Case No. 94-K-526, unreported.

"*** The statutory definition of 'natural gas company' in R.C. 5727.01(D)(4) is vague and ill-specified. Moreover, it overlaps with the definition provided in R.C. 5727.01(D)(5), which specifies that an entity 'is a pipe-line company when engaged in the business of transporting natural gas ... through pipes or tubing ...[.]' Any doubt in construction of these ambiguous provisions must be resolved in favor of Columbia

Transmission, Gulf Oil Corn. v. Kosvdar (1975), 44 Ohio St.2d 208, paragraphs one and two of the syllabus, which results in treating Columbia Transmission as a 'natural gas company.'

"*Specification Three*

"*** The assessment[s], and the final determination affirming it [them], violate the Commerce Clause, article I, section 8, clause 3 of the United States Constitution.

"*** Under the Commerce Clause, a state may not discriminate against or unduly burden interstate commerce. The Commissioner has assessed the taxable property of Columbia Transmission at a higher percentage of true value than comparable taxable property of other companies, including, but not limited to, local distribution companies. This disparate treatment discriminates against interstate commerce, disproportionately burdens the instrumentalities of interstate commerce, influences economic decision-making [sic] to favor entities operating intrastate, disproportionately burdens out-of-state consumers of natural gas, imposes an undue burden on interstate commerce and impedes the free flow of

natural gas in interstate commerce, all in violation of the Commerce Clause.

"*** R.C. 5727.111(D), and the 88% rate established therein, violate the Commerce Clause, both facially and as applied in this case.

"*Specification Four*

"*** By treating Columbia Transmission as a 'pipe-line company' under R.C. 5727.01(D)(5) rather than as a 'natural gas company' under R.C. 5727.01(D)(4), the Commissioner's assessment[s] and final determination violate the Due Process and Equal Protection Clauses of the United States and Ohio Constitutions.

"*** The statutory categories created by R.C. 5727.01(D)(4) and (D)(5) are vague, ambiguous, and overlapping. Columbia Transmission, although treated as a 'pipe-line company,' satisfies the statutory definition of a 'natural gas company.' Other companies, although treated as 'natural gas companies,' satisfy the statutory definition of a pipe-line company.' Similarly situated taxpayer are treated differently under these impermissibly vague statutory classifications.

"*** The statutory categories defined by R.C. 5727.01(D)(4) and R.C.

5727.01(D)(5) are unconstitutionally vague and violate the Due Process and Equal Protection Clauses of the United States Constitution and the Ohio Constitution, both facially and as applied in this case.

"*Specification Five*

"*** In determining the true value of Columbia Transmission's taxable public utility property and in assessing Columbia Transmission's taxable public utility property at 88% of true value, the Commissioner violated the Equal Protection and Due Process Clauses of the United States and the Ohio Constitutions.

"*** The Commissioner valued the taxable public utility property of others similarly situated or in competition with Columbia Transmission by using a substantially different methodology resulting in a lower true value than was applied to Columbia Transmission's property.

"*** The Commissioner assessed the taxable public utility property of others similarly situated or in competition with Columbia Transmission at a lesser percentage of true value than was applied to Columbia Transmission's property.

"*** R.C. 5727.111(D), and the 88% assessment rate established therein, violate the Due Process and Equal Protection Clauses, both facially and as applied in this case.

"*Specification Six*

"*** The assessment[s], and the final determination affirming it [them], impair, are inconsistent with, and stand as an obstacle to federal regulatory authority under the Natural Gas Act, 15 U.S.C. §§ 717-717w, and other applicable federal statutes and thus, violate the Supremacy Clause, article VI, clause 2 of the United States Constitution.

"*** R.C. 5727.111(D), and the 88% assessment rate established therein, impair, are inconsistent with, and stand as an obstacle to federal regulatory authority under the Natural Gas Act, 15 U.S.C. §§ 717-717w, and other applicable federal statutes and thus, violate the Supremacy Clause, article VI, clause 2 of the United States Constitution, both facially and as applied in this case."

As was the case before the commissioner, this appeal centers upon the appropriateness of the assessment rate applied to appellant's property for purposes of ad valorem taxation. We first dispense with the constitutional arguments which have been

advanced by appellant, responding initially to appellant's request that the board reconsider certain evidentiary rulings made during the course of the hearing convened in this matter. At hearing, appellant sought admission of evidence relating to the General Assembly's consideration and ultimate enactment of Am.Sub.S.B. 287, 148 Ohio Laws, Part V, 11536, 11549-11550 (effective December 21, 2000).[3] Although the examiner declined to admit this evidence, appellant was accorded an opportunity to proffer its evidence and to seek this board's reconsideration.

Through Am.Sub.S.B. 287, the General Assembly amended R.C. 5727.111 so as to reduce the assessment rate prescribed for property owned by natural gas companies, beginning with the 2001 tax year, from 88% to 25%. Citing to Section 17 of Am.Sub.S.B. 287, appellant notes that the changes embodied in this legislation were effected as an emergency measure in order "to provide, at the earliest possible time, for equitable taxation of participants in the natural gas markets." 148 Ohio

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[3] The evidence which was not admitted, but which appellant was permitted to proffer, consists of: (1) Ex. 25 - the May 2, 2000 written testimony of Larry L. Long, Executive Director of the County Commissioners' Association of Ohio, presented to the Senate Ways and Means Committee; Ex. 26 - the May 2, 2000 written testimony of Warren G. Russell, Deputy Executive Director of the Ohio School Boards Association, presented to the Senate Ways and Means Committee; Ex. 27 - a DVD from Ohio Government Telecommunications of the testimony before the General Assembly regarding Am.Sub.S.B. 287; and certain portions of testimony provided at this hoard's hearing by Sam Gerhardstein, appellant's current director of governmental affairs.

Laws, Part V, 11620. Appellant asserts that the evidence it sought to have admitted demonstrates not only that the General Assembly's action was in direct response to then-pending litigation involving the constitutionality of the differing assessment rates applicable to natural gas companies and general business taxpayers, [4] alleged to be in direct competition, but also that the legislature failed to achieve its own goal of "equitable taxation" by not simultaneously reducing the assessment rates for pipe-line companies, a claimed constitutional infirmity of which it and various individuals within the tax department were allegedly aware.

This board has previously expressed its reluctance to accept as evidence documents purportedly reflecting legislative intent. For example, in *Jack Schmidt Lease, Inc. v. Tracy* (July 14, 1995), BTA No. 1994-M-13, unreported, affirmed sub nom. *Zalud Oldsmobile Pontiac, Inc. v. Tracy* (1996), 77 Ohio St.3d 74, the appellant sought admission of a letter of a member of the Ohio House of Representatives regarding the legislative intent and purpose of a particular statute. This board concluded that not only did this letter constitute hearsay for which no exception applied,[5] but also that it was "irrelevant because an individual representative has no ability to

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[4] The litigation to which appellant refers is Columbia Gas of Ohio v. Tracy (Aug. 6, 1999), BTA No. 1997- K-545, unreported, docketed with the Supreme Court of Ohio as case number 99-1633, and subsequently dismissed at the taxpayer's request. See 01/12/2001 Case Announcements, 91 Ohio St.3d 1401.

[5] On appeal, the court determined that the document in question was inadmissible under either Evid.R. 803(8) or 1005.

speak for the legislature." Id. at 4. Continuing, we noted that "[e]ven without considering the layers of hearsay concerns here involved, the subsequent representations of one member of a legislative body, even the sponsor of a bill, are not probative of the intent of the body at the time of enactment of a bill. *Financial Indemnity Co. v. Cargile* (1972)[,] 32 Ohio Misc. 103.[6] Therefore, even if hearsay was not a concern, Representative Johnson's statements concerning the purposes of the bill would not be probative of intent." Id. at 5. See, also, *Glick v. Sokol*, 149 Ohio App.3d 344, 346, 2002-Ohio-4731 ("We note that Ohio has no official legislative history and, consequently, sponsor testimony is of limited value to our analysis. See *State v. Dickinson* (1971), 28 Ohio St.2d 65, 67 ***."); *Vukovich v. City of Youngstown* (Sept. 25, 1990), Mahoning App. No. 83 C.A. 198, unreported, jurisdictional motion overruled (1991), 58 Ohio St. 3d 703; *Cleveland Elec. Illum. Co. v. Cleveland* (Apr. 21, 1977), Cuyahoga App. No. 35999, unreported. Cf. *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, paragraph 7 of the syllabus ("Courts have no legislative authority and should not make their office of expounding statutes a cloak for

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[6] In Financial Indemnity, the court commented: "We are here involved with a question of the intent of the Legislature. Plaintiff has submitted the affidavit of a former member of the Ohio General Assembly who sponsored the bill which became the act enacting the sections of the code with which we are here concerned. This affidavit seeks to interpret the intent of the Legislature. We believe that the meaning of the act must be determined from the words of the statute itself. The court cannot consider what an individual legislator, even the author of the bill, states he understood them to mean." Id. at 106.

supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Slingluff v. Weaver* [(1902)], 66 Ohio St., 621, approved and followed.").

Through its proffer, appellant attempts to prove the intent of the General Assembly when it reduced the assessment rate for natural gas companies in order to support its arguments in this case challenging the constitutionality of the assessment rate left unchanged for pipe-line companies. After considering the parties' arguments, we are not persuaded that we should deviate from the rationale expressed by this board in *Jack Schmidt Lease*. The statute in question, which provides for the assessment of pipe-line company property at 88%, as opposed to the 25% assessment rate for other entities, is unambiguous and requires no further explanation. Instead, a determination regarding the constitutionality of the statute and its application can be made through a review of the express language set forth in the statute and the facts presented by the parties. Even assuming, arguendo, such evidence is admissible, appellant is not prejudiced by our ruling at this stage of the proceedings as this board is without jurisdiction to consider its constitutional claims. Rather, an appellate court with such authority may overturn this ruling and directly consider appellant's proffered evidence in the context of the arguments which have been advanced. Accordingly, appellant's motion for reconsideration is hereby overruled.

With respect to the merits of appellant's constitutional challenges, we acknowledge once again the lack of our ability to ultimately resolve such claims. See, e.g., *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, et al., unreported. Instead, as pointed out by the Supreme Court in *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, such authority is reserved to Ohio's courts[7]:

> "The BTA understood its role to be a receiver of evidence for constitutional challenges. Accordingly, it did so, giving the parties wide latitude in presenting the evidence. The BTA determined no facts on the constitutional questions. The commissioner, however, in her Proposition of Law No. IV, contends that the BTA not only receives evidence in this type of case, but must weigh the evidence and determine the facts

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[7] Section 1, Article IV, of the Ohio Constitution provides that "[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." Further, the Supreme Court of Ohio has expressly acknowledged that "[t]he power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have firmly been established as an essential feature of the Ohio system of separation of powers. See, e.g., Beagle v. Palden (1997), 78 Ohio St. 3d 59, 62, "*** ('interpretation of the state and federal Constitutions is a role exclusive to the judicial branch')." State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451,462. (Parallel citations omitted.)

necessary for the court's review of the constitutional questions. Since the BTA did not make findings of fact, the commissioner asserts that we should remand the case for the BTA to comply.

"In Cleveland Gear Co. v. Limbach (1988), 35 Ohio St. 3d 229, *** paragraph three of the syllabus, we held:

"'The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (*Bd. of Edn. of South-Western City Schools v. Kinney* 119861, 24 Ohio St.3d 184, *** construed.)'

"We explained the process, 35 Ohio St.3d at 232 ***:

"'When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

"'To accommodate this court's need for extrinsic facts and to provide a forum

> where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder.'
>
> "Under *Cleveland Gear*, the BTA need only receive evidence for us to make the constitutional finding. This is because the BTA accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have a limited ability to receive evidence. Thus, the BTA receives evidence at its hearing, but we determine the facts necessary to resolve the constitutional question." Id. at 197- 198. (Parallel citations omitted.)

See, also, *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9,2002-Ohio-2984; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229.

The parties were accorded an opportunity to offer evidence in support of their respective positions relating to appellant's constitutional arguments. Given this board's inability to decide such issues, appellant's arguments must be overruled at this administrative level of proceedings.

This board does, however, have the authority to address appellant's argument that it satisfies the statutory definition of a natural gas company and is therefore entitled to have its property assessed at a more favorable rate than that applied to pipe-line

companies, the classification currently applied to it by the Tax Commissioner. Beginning with tax year 2001, the General Assembly amended R.C. 5727.111 so as to establish, for the first time, different assessment rates for the property of public utilities classified as natural gas companies and pipe-line companies, 25% and 88%, respectively. See R.C. 5727.111(C) and (D). For purposes of determining which assessment rate applies, we must look to R.C. 5727.01(D), which defines both a natural gas company and a pipe-line company, providing in relevant part:

> "Any person:
>
> "* * *
>
> "(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state;[8]
>
> "(5) Is a pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives

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[8] Effective June 26, 2001, the definition of a natural gas company set forth in R.C. 5727.01(D)(4) was modified to provide that a person is a natural gas company when it is "engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within this state, excluding a person that is a governmental aggregator or retail natural gas supplier as defined in section 4929.01 of the Revised Code[.]" 149 Ohio Laws, Part II, 3857, 3896.

> through pipes or tubing, either wholly or partially within this state[.]"

Appellant argues that the preceding definitions are not mutually exclusive and that it qualifies as both a natural gas company and a pipe-line company. Acknowledging that this overlap in definitions has existed for some time, it was not until natural gas companies were accorded more favorable tax treatment that appellant was motivated to seek reclassification for tax purposes from a pipe-line company to a natural gas company.

Rejecting appellant's contentions, the commissioner commented in his final determination as follows:

> "The petitioner objects to the statutory requirement in R.C. 5727.111 that the taxable property of a 'pipe-line company' be assessed at an 88% listing percentage, rather than at the 25% listing percentage prescribed by the statute for all taxable property of a 'natural gas company.' The petitioner contends that it is a 'natural gas company' under R.C. 5727.01(D)(4) and should be assessed as a natural gas company rather than a pipeline company.[9] In furtherance of this argument, the petitioner has submitted a chart reflecting the number

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[9] The record contains varying references to both 'pipeline" and "pipe-line" companies. While both are intended to refer to the same type of entity, we will utilize the latter as it is consistent with R.C. 5727.01(D)(5).

of customers by county that are connected to its pipeline. The total exceeds 3 1,900 customers, but based on the evidence, the majority are 'farm tap customers' granted the right to tap into the pipeline at the time of construction. Based on the evidence, this contention is not well taken. The above description that the petitioner gives of its operations is the description of a pipeline company and not of a natural gas company. R.C. 5727.01(D)(4) states that a natural gas company supplies or distributes 'natural gas for lighting, power, or heating purposes to consumers within this state ...[.]' The petitioner is not supplying or distributing gas directly to consumers, but rather transporting natural gas through a network from Kentucky into the Midwest and then on to the Eastern Seaboard via pipelines. The transportation and storage services are for local gas distribution companies and industrial and commercial customers that contract for gas with producers or marketers. Therefore, the petitioner is properly classified as a pipeline company under R.C. 5727.01(D)(5). ***

"***

"Further, the petitioner does not fit the profile of a typical natural gas company. Most natural gas companies tend to

> operate in one state only, while pipeline companies tend to be interstate businesses. The Public Utilities Commission of Ohio (PUCO) regulates natural gas companies that operate within Ohio. As part of the regulation of a natural gas company, a service territory is designated. The PUCO has not designated a service territory for the petitioner since it does not recognize the petitioner as a natural gas company. FERC (the Federal Energy Regulatory Commission) publishes a listing of companies that it considers natural gas pipeline companies. The petitioner is included on the FERC list of natural gas pipeline companies. Thus, PUCO does not consider the petitioner a natural gas company, and FERC considers it a natural gas pipeline company." S.T. at 1-2.

Before this board appellant presented evidence demonstrating that a significant portion of its business involves transporting natural gas through an interstate network of pipelines and operating natural gas storage facilities inside and outside Ohio. With regard to its transportation services, appellant has pipeline in ten states, approximately 4,000 miles of which are located in Ohio, receiving natural gas at various interconnection points along its pipeline network. In providing transportation services, appellant is subject to regulation by the Federal Energy Regulatory Commission ("FERC") as a

"natural-gas company" under the Natural Gas Act. Section 717, Title 15, US. Code.[10]

All of the natural gas transported by appellant is owned by its customers and moved by appellant between points on its network designated by its customers. In providing these transportation services, appellant's customers include: "local distribution companies" ("LDCs"), which typically deliver natural gas directly to residential and commercial end-use consumers; large industrial and electric generating companies, e.g., First Energy, Pacific Gas & Electric, U.S. Gypsum, which, instead of receiving gas from an LDC, acquire it through a direct connection to appellant's pipelines; and natural gas marketers, which purchase gas from producers and sell it to end-users, but which are not subject to regulation as a utility. In addition, appellant has groups of residential and "farm tap" customers, totaling almost 32,000, who acquire direct access to appellant's pipeline system, the latter emanating typically from construction or right-of-way agreements. In addition to its natural gas transportation services, appellant also provides natural gas storage services whereby appellant

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[10] Section 717(b), Title 15, US. Code, states: The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

injects its customers' natural gas into underground wells for later withdrawal in response to seasonal demands or market variations.

Based upon the foregoing activities, appellant insists it qualifies as a natural gas company since it "suppl[ies] natural gas for lighting, power, or heating purposes to consumers within this state." R.C. 5727.01(D)(4). Appellant contends that not only do the thousands of customers it serves through direct connections to its pipeline satisfy the preceding definition, but, it also argues that the statute does not limit its terms to a final transfer of natural gas to end users. Since appellant supplies gas to LDCs and natural gas marketers which, in turn, deliver it to Ohio end-use consumers, also serves as a basis upon which it satisfies the above-quoted definition of a natural gas company.

Although the commissioner acknowledges limited instances where appellant's customers have direct connections to its pipeline network, he insists that appellant is primarily engaged in the interstate transmission of natural gas. Maintaining that appellant is appropriately treated as a pipe-line company pursuant to R.C. 5727.01(D)(5), the commissioner emphasizes the differing regulatory treatment between pipe-line and natural gas companies. Considered a transporter of natural gas in interstate commerce, appellant is subject to regulation by the FERC rather than the Public Utilities Commission of Ohio ("PUCO"). Unlike appellant, entities treated as natural gas companies by the PUCO are subject to various public service obligations, including requirements to serve all members of the public and ensure access to natural

gas, abide by approved rates, adhere to specific procedures prior to terminating service, and comply with specific reporting requirements regarding business conduct.[11]

In order to resolve whether appellant constitutes a natural gas or pipe-line company under R.C. 5727.01(D)(4) or (5), this board must determine the extent to which it is appropriate to look beyond the language set forth within the statute. Appellant argues that we need look no further than the definitions themselves, while the commissioner maintains that these definitions should be construed or interpreted in light of appellant's historical treatment as a pipe-line company, the primary nature of its business, and the differing regulatory treatment accorded natural gas and pipe-line companies. Upon consideration of the parties' arguments, we agree with appellant that the conditions clearly set forth within R.C. 5727.01(D) render it unnecessary to look to factors beyond those expressly delineated within the statute.

Making general references to the "profile of a typical natural gas company," the commissioner suggests that appellant's historical treatment as a pipe-line company have some bearing upon whether it is considered a natural gas company or a pipe-line company, questioning appellant's contention that it can qualify as both under the definitions prescribed by the legislature. The evidence before this board demonstrates that regulatory changes and increased

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[11] Although regulated by the FERC rather than the PUCO, appellant asserts that it is subject to similar regulatory requirements under the Natural Gas Act.

competitive forces have significantly altered the natural gas industry during the last three decades, blurring former distinctions which may have existed between interstate pipeline companies and LDCs. The failure of the legislature to take into consideration these developments, however, does not warrant this board's adding to or deleting from the express language of R.C. 5727.01(0)(4) and (5). As noted in *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St.2d 1:

> "When this court has been called upon to give effect to an Act of the General Assembly, a standard of judicial restraint has developed when the wording of the enactment is clear and unambiguous. For example, a statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation. *Crowl v. Deluca* (1972), 29 Ohio St. 2d 53, 58-59; *Slingluff v. Weaver* (1902), 66 Ohio St. 621. *** In ascertaining the legislative intent of a statute, 'It is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.' (Emphasis added.) *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127; *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28. Furthermore, whether an act is wise or unwise is a question for the General Assembly and not this court. *Olin Mathieson Chemical Corp. v. Ontario Store* (1967), 9 Ohio St. 2d 67,

70." Id. at 6. (Footnote omitted and emphasis sic.)

Neither R.C. 5727.01(D)(4) nor (5) imposes a "primary business" test as an element in determining under which definition an entity should be classified for tax purposes. Clearly, the General Assembly is capable of setting forth such parameters in the tax area, having done so in several other instances where there exists the possibility that an organization may be engaged in multiple activities or, of a comparable nature, property may be devoted to multiple uses. See, e.g., R.C. 5701.02(C) and 5701.03(B) (defining "fixture" and "business fixture" as tangible personal property permanently attached or affixed to land, building, structure, or improvement, which "primarily benefits" the land or the business, respectively); R.C. 5709.07(A)(3) (exempting from real property tax land "used primarily for church retreats or church camping"); R.C. 5709.20 (defining various pollution control and energy-related facilities by making reference to their "primary purpose"); R.C. 5709.55 (exempting from personal property tax property used or held by a holder of a liquor permit whose "primary business" is the production of wine); R.C. 5725.01(B)(1) (defining a "dealer in intangibles" as one engaged in a business which "consists primarily of lending money" or other listed activities); R.C. 5727.01(D) (defining a person as a "telephone company" when "primarily engaged" in providing local exchange telephone service); R.C. 5727.02 (differentiating between "primary" and "incidental" business activities of various public utilities referenced within R.C. Chapter 5727.); R.C. 5733.09(D)(1) (defining a "commercial printer" for

purposes of corporate franchise tax obligations as a person "primarily engaged in the business of commercial printing").[12]

We are also not persuaded that appellant's regulation by the FERC rather than by the PUCO dictates its classification for purposes of taxation. In *Carnegie Natural Gas Co. v. Tracy* (Nov. 17, 1995), BTA No. 194-K-526, unreported, this board concluded that the taxpayer was entitled to a refund of corporate franchise tax it had paid because it met the definition of a natural gas company set forth in R.C. 5727.01 and was therefore exempt from such tax.[13] Rejecting arguments similar to those advanced in this appeal, ie., that the applicable taxing statutes be construed so as to take into consideration whether the taxpayer was regulated by the PUCO, this board held:

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[12] There have been instances in which the Supreme Court has developed its own "primacy," or "true object," test where none was expressly imposed by statute. See, e.g., *Emery Industries, Inc. v. Limbach* (1989), 43 Ohio St.3d 134 (construing *Accountant's Computer Serv. v. Kusydar* (1973) 35 Ohio St.2d 120, and concluding that in order to determine whether a "mixed transaction" involving the rendition of a personal service and the transfer of tangible personal property was subject to sales/use tax, it was necessary to ascertain whether the services rendered were a consequential or inconsequential aspect of the transaction). However, where terms and conditions are clearly set forth by statute, the court has been reluctant to amplify such terms and conditions. See, e.g., *SCM Chemicals, Inc. v. Zaino*, 106 Ohio St.3d 43, 2005-Ohio-3676; *Elkem Metals Co., L.P. v. Washington Cty. Bd. of Revision* (1998), 81 Ohio St.3d 683; *Bernardini, supra*.

[13] In *Carnegie Natural Gas, supra*, the definitions of natural gas and pipeline companies were set forth in former R.C. 5739.01(E)(4) and (5).

"In considering the Tax Commissioner's final determination, in which he relied extensively upon the absence of appellant's regulation by the PUCO, we refer to the admonition found in a portion of the court's syllabus in *State, ex rel. Foster v. Evatt* (19441, 144 Ohio St. 65:

"'7. Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Slingluff v. Weaver* [(1902)], 66 Ohio St., 621, approved and followed.)

"'8. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation net provided for.'

"See, also, *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 27-28 (holding 'neither the Board of Tax Appeals, nor this court, may legislate to add a requirement to a statute enacted by the General Assembly.')[.]

"Given the similarity between the definitions set forth at 5727.01(E)(4) and (5) and those found in R.C. 4905.03(A)(6)

and (7), under certain circumstances, it may be appropriate to consider the PUCO's interpretation and application of the latter statutes when determining the effect of the former. See *Akron Transp. Co. v. Glander* (1951), 155 Ohio St. 471; *Chrysler [Corp v. Tracy* (Jan. 21, 1994), BTA No. 1991-K-1523, unreported, affirmed (1995), 73 Ohio St.3d 26].

However, neither R.C. 5733.09 [n]or R.C. 5727.01 condition the status of a company as a public utility for purposes of exempting it from the imposition of franchise tax upon its regulation by the PUCO. Additionally, appellant has suggested that the PUCO may actually be preempted from such regulation by virtue of the Natural Gas Act. See 15 U.S.C. section 717, et seq.; Brief of Appellant at 9 (collecting case[s]). Accordingly, we proceed to determine whether appellant qualifies as a natural gas company, or in the alternative, a pipe-line company as expressly defined by R.C. 5727.01(E)." Id. at 14-16.

Cf. *Marano v. Gibbs* (1989), '45 Ohio St.3d 3 10, 3 11 ("The definitions of a 'public utility' set forth in R.C. 4905.02,4905.03 and 5727.01 are not exclusive since those definitions are relevant solely to the statutory chapters in which they are located. *Vernon v. Warner Amex Cable Communications, Inc.* (1986), 25 Ohio St.3d 117, 119 ***."); *Continental Cablevision of*

Ohio, Inc. v. Tracy (July 10, 1998), BTA Nos. 1996-K-6, et a]., unreported, at 38, fn 12.

Had it been the intent of the General Assembly to define a natural gas company or a pipe-line company on the basis of whether it is regulated by the FERC or the PUCO, it could easily have included such analysis as a determining factor. It chose not to do so and this board will not amplify the terms of R.C. 5727.01(D) to now achieve such a result. *Shell v. Ohio Veterinary Med. Licensing Bd.,* 105 Ohio St.3d 420,729, 2005-Ohio-2423 ("For that reason, it does seem plausible, perhaps even probable, that the General Assembly did intend the notice provision not to apply when the board conducts investigatory inspections. However, the strongest indication of the General Assembly's intent is the language it uses in a statute. ***"); *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265-266 ("The first rule of statutory construction is that a statute which is to be applied, not construed. 'There is no authority under any rule of statutory construction to add to, enlarge, supply, expands, extend or improve the provisions of the statute to meet a situation not provided for.' *** Our obligation is to apply the statute as written. ***").

Even disregarding appellant's contention that its delivery of natural gas to LDCs and natural gas

marketers qualifies it as a natural as company,[14] the record demonstrates that it directly supplies natural gas to industrial, power-generating, residential, and farm customers for the purposes delineated in R.C. 5727.01(D)(4). While it may indeed also satisfy the definitional elements of a pipe-line company, its election to not previously challenge its treatment is reasonable given the prior similarities in their treatment for tax purposes. However, having now successfully demonstrated that it is indeed a natural gas company as defined by R.C. 5727.01(D)(4), appellant is entitled to have its property assessed at the listing rate prescribed for such entities.

Consistent with the preceding discussion, and to the extent within this board's jurisdiction, appellant's first specification of error is well taken and is sustained. The remainder of appellant's specifications are beyond this board's jurisdiction and must therefore be overruled. Accordingly, it is the order of this board that the Tax Commissioner's final determination, consistent with foregoing discussion, is hereby reversed.

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[14] We question whether the distribution of natural gas to LDCs and natural gas marketers, which themselves do not consume such gas for their own lighting, power, or heating purposes, would qualify appellant as a natural gas company under R.C. 5727.01(D)(4). See *Chrysler Crop. V. Tracy* (19950, 73 Ohio St.3d 26. However, given the other entities to which appellant supplies natural gas for these purposes, we need not make such determination.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

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Julia M. Snow, Board Secretary

Columbia Gas Transmission Corporation
200 Civic Center Drive
Columbus, Ohio 43215

Re: Case Nos. 01-01849 & 01-05338
Public Utility Property Tax
Various Ohio Companies
Tax Years: 2000 and 2001

FINAL DETERMINATION

This is the final determination of the Tax Commissioner on two petitions for reassessment pursuant to R.C. 5727.47. A hearing was held on these matters.

The petitioner "operates an interstate gas pipeline network extending from Kentucky to the Midwest and the Eastern Seaboard. In addition, Columbia Transmission operates an underground natural gas storage system." The subject assessments were issued as the result of the petitioner filing its 2000 and 2001 Annual Ohio Public Utility Property Tax Natural Gas Pipeline Company Reports. Timely petitions for reassessment were filed raising several constitutional arguments. Furthermore, the petitioner also raised an issue with respect to the valuation of the Ohio taxable property proposing that appraisal information would establish a more accurate value for its property.

The petitioner believes that the assessments at issue violate its due process and its right of equal protection. Additionally, the petitioner contends that the assessments violate its rights under the

Commerce Clause and are in violation of the Supremacy Clause of the U.S. Constitution. Specifically, it contends that "the taxable personal property of others similarly situated or in competition with Columbia Transmission was assessed at a lesser percentage of true value and/or the Commissioner valued and assessed the taxable property of others similarly situated or in competition with Columbia Transmission by using a substantially lower true value than was applied to Columbia Transmission's property."

The petitioner objects to the statutory requirement in R.C. 5727.111 that the taxable property of a "pipeline company" be assessed at an 88% listing percentage, rather than at the 25% listing percentage prescribed by the statute for all taxable property of a "natural gas company." The petitioner contends that it is a "natural gas company" under R.C. 5727.01(D)(4) and should be assessed as a natural gas company rather than a pipeline company. In furtherance of this argument, the petitioner has submitted a chart reflecting the number of customers by county that are connected to this pipeline. The total exceeds 31,900 customers, but based on the evidence, the majority are "farm tap customers" granted the right to tap into the pipeline at the time of construction. Based on the evidence, this contention is not well taken. The above description that the petitioner gives of its operations is the description of a pipeline company and not of a natural gas company. R.C. 5727.01(D)(4) states that a natural gas company supplies or distributes "natural gas for lightening, power, or heating purposes to consumers within this state. . ." The petitioner is not supplying or distributing gas directly to consumers, but rather transporting

natural gas through a network from Kentucky into the Midwest and then on to the Eastern Seaboard via pipelines. The transportation and storage services are for local gas distribution companies and industrial and commercial customers that contract for gas with producers or marketers. Therefore, the petitioner is properly classified as a pipeline company under R.C. 5727.91(D)(5). This conclusion is supported by one of the petitioner's Vice President's testimony at the hearing conducted in this case.

In response to the question: "What does 'unbundle' mean", Carl Levander, Vice President, Regulatory & Strategic Initiatives, stated:

> When I started with Columbia, the bulk of its business involved the sale of gas. Generally, producers sold their gas to interstate pipelines such as Columbia, which in turn sold it to local distribution companies. Interstate pipelines provided a product that included both the gas itself and the transportation and storage required to deliver it. The regulatory changes required that those components be separated from each other, ultimately leading to Columbia exiting the business of buying and selling gas. Now, Columbia Gas Transmission is not involved in buying and selling the commodity of natural gas itself, and instead provides only transportation and storage services.

Further, the petitioner does not fit the profile of a typical natural gas company. Most natural gas companies tend to operate in one state only, while pipeline companies tend to be interstate businesses. The Public Utilities Commission of Ohio (PUCO) regulates natural gas companies that operate within Ohio. As part of the regulation of a natural gas company, a service territory is designated. The PUCO has not designated a service territory for the petitioner since it does not recognize the petitioner as a natural gas company. FERC (the Federal Energy Regulatory Commission) publishes a listing of companies that it considers natural gas pipeline companies. The petitioner is included on the FERC list of natural gas pipeline companies. Thus, PUCO does not consider the petitioner a natural gas company, and FERC considers it a natural gas pipeline company.

Next, the petitioner has submitted documentation of Ohio natural gas companies that have transmission equipment listed in their PUCO reports. Therefore, the petitioner contends, there are natural gas companies that are competing with it for customers to transport natural gas. As these competitors are listing their property at 25% instead of the 88% at which the petitioner is required to report its property, the petitioner contends that there is an equal protection issue. However, while some intrastate competition may exist for transportation of gas, the local distributing companies (LDC's) are restricted in transporting gas. They are under the PUCO's regulatory authority, not FERC's. Once again, the separation of natural gas companies and pipeline companies has a basis in fact and must stand.

As noted above, the petitioner contends that the assessment violates the Equal Protection and Due Process Clauses of the United States and Ohio Constitutions. The petitioner cites, among other cases, *Allied Stores of Ohio v. Bowers* (1959), 358 U.S. 522 and *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195 in support. Also, the petitioner contends that the assessment violates the Commerce Clause and the Supremacy Clause of the United States Constitution. Various cases are cited in support of the argument that the taxing scheme discriminates against interstate commerce and interferes with the FERC's authority. These contentions are not well taken.

In *Gen. Motors Corp. v. Tracy* (1997), 519 U.S. 278, the United States Supreme Court reviewed the issue of whether Ohio could impose a sales tax on natural gas sold by producers and independent marketers to their customers, and not impose a sales tax on gas sold by LDC's to its customers. The Court held that the different tax treatment was justified and did not violate the Commerce Clause and the Equal Protection Clause of the United States Constitution, because the LDC's are substantially different entities from other natural gas vendors. The Court found that an LDC is a typical natural gas company because it primarily distributes to residential gas customers through its extensive distribution system, while marketers and producers are not natural gas companies because they do not distribute gas to residential customers and do not own their own distribution system. Likewise, in the instant case, the petitioner is not similarly situated to the LDC's in Ohio that are classified as natural gas companies under R.C. 5727.01(D)(4). The LDC's distribute gas

through their distribution systems to residential and business customers, while the petitioner does not own a distribution system with which to serve residential and business customers, and instead provides transportation and storage services for LDC's and large industrial customers. The existence of farm tap customers does not make the petitioner an LDC. The connections are a convenience to the landowners and not part of a customer distribution system of a natural gas company.

Similarly, an argument regarding the Equal Protection Clauses of the United States and Ohio Constitutions was raised in *GTE North, Inc. v. Zaino* (2002), 96 Ohio St.3d 9. The Supreme Court of Ohio upheld the different classifications of companies and different listing rates established by the General Assembly in R.C. 5727.01 and R.C. 5727.111.

The petitioner contends that the "assessment impairs and is inconsistent with federal regulatory authority under applicable federal statutes and thus, violates the Supremacy Clause, article VI, clause 2 of the U.S. Constitution." The petitioner is contending that Ohio tax law is hindering federal objectives of the FERC regulations. This contention is not well taken. There is no inconsistency between FERC regulation and Ohio's tax statutes. The Federal Energy Regulatory Commission regulates the operation of interstate pipelines such as the petitioner, while the Ohio statutes at issue pertain to determining the value of business property for tax purposes. There is no impairment of the FERC regulations or FERC goals and objectives by Ohio's taxation of the petitioner's assets. Simply, since the petitioner engages in business and uses tangible

personal property in business in Ohio it has become subject to the public utility property tax as imposed pursuant to the applicable taxing statutes in this state. Notwithstanding the existence of numerous customers of the petitioner and the existence of transmission property in the hands of several natural gas companies (LDC's), the petitioner continues to meet the definition of a pipeline company and shall be taxed accordingly.

The subject assessment was issued under the authority of various sections of the Ohio Revised Code, including R.C. 5727.01 and 5727.111, which require taxpayers meeting the definition of a pipeline company to have their taxable personal property assessed at 88% of true value. A review of the file in this case shows that the Tax Commissioner properly assessed the petitioner under the appropriate provisions of the Revised Code. Furthermore, the petitioner has not provided any substantive evidence to show that any improper assessment was issued and finally, the Tax Commissioner is without jurisdiction to decide constitutional issues. See *Cleveland Gear Co. v. Limbach* (1983), 35 Ohio St.3d 229.

The petitioner has raised a valuation issue based on appraisal information submitted after the hearing on this matter. A review of that information reflects that the petitioner contends that the Tax Commissioner's prescribed true value computation overvalues its taxable property. The appraisal documents a total taxable value of $215,850,310 for tax year 2000 and $217,872,800 for tax year 2001 whereas the value determined upon assessment was $241,513,740 for tax year 2000 and $240,365,580 for

tax year 2001. The appraisal methodology and several of the factors relied on by the petitioner are inconsistent with other appraisals reviewed and adjusted by the Tax Commissioner. The petitioner has applied a capitalization rate to the formula, which uses a flotation element, which the Tax Commissioner has previously rejected. Furthermore, in estimating the net operating income, the petitioner has used a simple average when a better estimate can be obtained by using a combination of simple, weighted and trended estimates. Finally, in arriving at the overall system value of the company by combining the values determined by the cost and income approaches, the petitioner only attached a weighting of 10% to the cost approach. This weighting of 10% on the cost approach would be adjusted because it places almost total emphasis on the income approach and disregards the cost approach. The determination of true value for Ohio personal property tax purposes has historically relied on the cost as recorded on the books and records as the beginning point in determining true value. Often times using an income approach results in no value being assigned to a business's tangible personal property because the business has net operating losses. However, this dies not mean that the tangible personal property has no value. Because the income approach can be unreliable in the determination of true value, the weighting attached to the appraisal cost approach in determining the overall system value would be increased to place more emphasis on cost and less on income.

In *Texas Eastern Transmission Corp. v. Tracy* (1997), 78 Ohio St.3d 83, the Ohio Supreme Court held that an alternate valuation method may be

considered to determine true value when such a method is more accurate than the statutory cost-based approach of R.C. 5727.11. In the instant case, for the reasons given in this final determination, the appraisals submitted by the petitioner are not a more accurate gauge of true value of the petitioner's property than the assessed value for each year at issue.

Accordingly, the assessments are affirmed.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THESE MATTERS. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THESE MATTERS WILL BE CONCLUDED AND NOTICE OF SUCH FINAL DETERMINATION WILL BE SENT PURSUANT TO R.C. 5727.47 TO THE APPROPRIATE COUNTY AUDITORS, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5727.471.

I HEREBY CERTIFY THE FOREGOING
TO BE A TRUE AND CORRECT COPY OF
THE ACTION OF THE TAX COMMISSIONER
TAKEN THIS DAY WITH RESPECT TO THE
ABOVE MATTER.

//s// _____
Thomas M. Zaino

Tax Commissioner